

1 Honorable Jay M. Polk  
2 Probate and Mental Health Department Presiding Judge  
3 Superior Court in Maricopa County  
4 101 W. Jefferson Street  
5 Phoenix, Arizona, 85003  
6 (602) 372-0879

7 IN THE SUPREME COURT  
8 STATE OF ARIZONA

9 In the Matter of } Supreme Court No. R-23-0029  
10 PETITION TO AMEND SUPREME } COMMENT TO PROPOSED  
11 COURT RULE 123 } AMENDMENT OF RULE 123,  
12 } RULES OF SUPREME COURT

13 Pursuant to Rule 28, Rules of the Supreme Court of Arizona, the Presiding  
14 Judge of the Probate and Mental Health Department of the Superior Court in  
15 Maricopa County, submits the following comment regarding the proposed  
16 amendment of Rule 123, Rules of the Supreme Court of Arizona (“Rule”). For  
17 the past six years, the undersigned has been the only judicial officer in Maricopa  
18 County who has presided over matters brought under A.R.S. Title 36, Chapter  
19 37, a.k.a the Sexually Violent Persons Act (“SVPA”), up through and including  
20 the adjudication phase, i.e. when the jury or court determines whether the  
21 respondent is a sexually violent person (“SVP”) as defined in A.R.S. § 36-  
22 3701(7).<sup>1</sup> The undersigned submits this comment on behalf of himself, as well  
23 as the following individuals with whom he has consulted about this matter:

- 24 • Jessica J. Fotinos, General Counsel and Public Information Officer  
25 for the Clerk of the Superior Court of Arizona for Maricopa  
26 County;

27  
28 <sup>1</sup>See generally A.R.S. § 36-3707.

- 1           • Sara Micflikier, the Deputy Maricopa County attorney who has  
2           represented the State of Arizona in nearly all the cases brought  
3           under the SVPA in Maricopa County over the past six years;
- 4           • Kathryn Krejci, the Deputy Maricopa County Public Defender who  
5           currently represents approximately one-half the respondents in  
6           cases brought under the SVPA in Maricopa County; and
- 7           • Nicole P. Hartley, a Commissioner of the Superior Court of Arizona  
8           for Maricopa County who, prior to serving as commissioner,  
9           represented approximately one-half the respondents in cases  
10          brought under the SVPA in Maricopa County.

11           The aforementioned group (the “Workgroup”) wholeheartedly supports the  
12          proposed promulgation of Rule 123(d)(7) to address public access to records of  
13          cases brought under the SVPA.<sup>2</sup> However, the Workgroup has identified two  
14          issues with the proposed Rule 123(d)(7).

15           The first issue is that, as proposed, Rule 123(d)(7)(A) would close certain  
16          documents to the public without providing any exceptions for persons or entities  
17          who need to access those documents. Those persons and entities are as follows:

- 18           • The County Attorney who is entitled to initiate the case under  
19           A.R.S. § 36-3704(A),<sup>3</sup>
- 20           • The Arizona Attorney General, who often represents the State in  
21           post-adjudication proceedings, *see* A.R.S. § 36-3709 and -3714, and  
22           who also represents the Arizona Community Protection and  
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24           <sup>2</sup>The Workgroup also has consulted with J. Nicholas Bacon, the Assistant Arizona Attorney General who  
25          represents the State and the Arizona Community Protection and Treatment Center in proceedings brought under the  
26          SVPA.

27           <sup>3</sup>A.R.S. § 36-3704(A)(1) authorizes only two categories of persons to initiate a case under the SVPA. The  
28          first is “[t]he county attorney in which a person was found incompetent to stand trial of, found guilty except insane  
of or convicted of a sexually violent offense.” The second is “[t]he county attorney in the county in which the  
person will be released or the attorney general if the person was found incompetent to stand trial of, found guilty  
except insane of or convicted of a sexually violent offense in another jurisdiction outside the state.”

1 Treatment Center (“ACPTC”), which is where an SVP usually is  
2 committed, *see* A.R.S. § 36-3707(B);

- 3 • The respondent;
- 4 • The respondent’s attorney;
- 5 • The entity that, pursuant to court order, is treating the SVP;<sup>4</sup> and
- 6 • Any other person the judge assigned to the case determines has a  
7 need for access to the documents.

8 Consequently, the Workgroup proposes that Rule 123(d)(7)(A) be amended, and  
9 a new subpart (B) be added, to read as follows (additions to the rule as originally  
10 proposed are shown in **BOLD ALL CAPS**; deletions are shown with ~~strike-~~  
11 ~~through~~):

12 **(A) EXCEPT AS OTHERWISE PROVIDED BY**  
13 **THIS RULE OR LAW, IN CASES FILED UNDER ARS**  
14 **TITLE 36, CHAPTER 37, Any document that is closed**  
15 **under (d)(2)(A) or is listed in ARS § 36-3702(D)(2)(a), (b), or**  
16 **(3) through (9) is closed TO THE PUBLIC.**

17 **(B) DOCUMENTS DESCRIBED IN 7(A) THAT**  
18 **ARE FILED IN AN ARS TITLE 36, CHAPTER 37 CASE**  
19 **ARE OPEN TO THE FOLLOWING:**

20 **(i) THE COUNTY ATTORNEY WHO IS**  
21 **ENTITLED TO INITIATE THE CASE UNDER ARS § 36-**  
22 **3704(A),**

23 **(ii) THE ARIZONA ATTORNEY GENERAL,**

24 <sup>4</sup>After a finding that a person is an SVP, the court must either (a) “[c]ommit the person to the custody of  
25 the department of health services for placement in a licensed facility under the supervision of the superintendent of  
26 the Arizona state hospital,” or (b) “[o]rder that the person be released to a less restrictive alternative.” A.R.S. § 36-  
27 3707(B). A “less restrictive alternative” is a “court-ordered treatment in a setting that is less restrictive than total  
28 confinement and that is conducted in a setting approved by the superintendent of the state hospital.” A.R.S. § 36-  
3701(4). If the court determines that the person’s release to a less restrictive alternative is warranted, the court  
must “require as a condition of release . . . that the person participate in outpatient treatment.” A.R.S. § 36-  
3710(E). As far as the Workgroup is aware, the only facility currently providing inpatient or outpatient treatment  
under the SVPA is the ACPTC, which is a licensed facility under the supervision of the superintendent of the  
Arizona State Hospital.

1                    (iii) THE RESPONDENT,

2                    (iv) THE RESPONDENT'S ATTORNEY,

3                    (v) A LAWFUL REPRESENTATIVE OF THE  
4                    ARIZONA STATE HOSPITAL OR OF A LICENSED  
5                    FACILITY UNDER THE SUPERVISION OF THE  
6                    SUPERINTENDENT OF THE STATE HOSPITAL THAT  
7                    PROVIDES TREATMENT UNDER ARS TITLE 36,  
8                    CHAPTER 37;

9                    (vi) A LAWFUL REPRESENTATIVE OF A  
10                    SERVICE PROVIDER DESIGNATED BY THE COURT  
11                    TO PROVIDE INPATIENT OR OUTPATIENT  
12                    TREATMENT OR TO MONITOR OR SUPERVISE ANY  
13                    OTHER TERMS AND CONDITIONS OF A PERSON'S  
14                    PLACEMENT IN A LESS RESTRICTIVE  
15                    ALTERNATIVE UNDER ARS § 36-3710, AND

16                    (vii) UPON A SHOWING OF GOOD CAUSE AND  
17                    AFTER NOTICE TO THE PARTIES TO THE CASE,  
18                    ANY OTHER PERSON THE JUDGE PRESIDING OVER  
19                    THE CASE HAS AUTHORIZED TO ACCESS THE  
20                    DOCUMENT.

21                    The second issue is that, as proposed by the petitioner, Rule 123(d)(7)(B),  
22                    would require a person filing a document that is closed under the rule to place the  
23                    document in a single envelope and would require each closed document to be  
24                    placed in its own envelope. Because typically multiple documents are attached  
25                    to, or filed with, the SVP case-initiating petition and because those documents  
26                    often are voluminous and do not need to be individually docketed, the  
27                    Workgroup recommends that Rule 123(d)(7)(B) be worded to allow the closed  
28                    document(s) to be submitted in one or more envelopes or boxes. In addition,  
29                    subpart (B) would need to be re-lettered as subpart (C) to account for the addition  
30                    of new subpart (B) as described above. Thus, the Workgroup proposes that Rule


1 123(d)(7)(C) read as follows (additions to the rule as originally proposed are  
2 shown in **BOLD ALL CAPS**; deletions are shown with ~~strike-through~~):

3 ~~(B)~~**(C)** A party filing a document that is closed under this  
4 section ~~must separate and identify~~ the document as  
5 “confidential,” by placing it in an envelope **OR BOX** marked  
6 with the case name, the case number, the name of the document  
7 being filed, the name of the party filing the document, and the  
8 words “Confidential Document.” A confidential document  
9 referenced in a pleading or motion as an exhibit, attachment, or  
10 appendix must state on the envelope **OR BOX** the title of that  
11 pleading or motion and identify the exhibit, attachment, or  
12 appendix number. A party must **PLACE ALL**  
13 **CONFIDENTIAL DOCUMENTS IN ONE OR MORE**  
14 **ENVELOPES OR BOXES THAT CONCEAL THE**  
15 **CONTENTS**~~use a separate envelope for each confidential~~  
16 ~~document.~~ The clerk is not required to review a document to  
17 determine whether it is a confidential document.

18 Last, the petitioner’s proposed subpart (C), which provides that “[a]ll other  
19 documents in ARS Title 36, Chapter 37 case files maintained by the clerk of  
20 court are open to the public, unless prohibited by law or sealed by court order,”  
21 would need to be re-lettered as (D).<sup>5</sup>

22 For these reasons, the Workgroup respectfully requests that the Court grant  
23 the Petition to Amend Supreme Court Rule 123 but with the changes to Rule  
24 123(d)(7) as suggested by the Workgroup.

25 RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of April 2023.

26   
27 \_\_\_\_\_  
28 Hon. Jay M. Polk, Presiding Judge  
29 Probate and Mental Health Department  
30 Superior Court in Maricopa County

31 \_\_\_\_\_  
32 <sup>5</sup>The Workgroup does not have any suggested substantive changes to proposed Rule 123(d)(7)(C) and  
33 only recommends re-lettering it.

1  
2 Electronic copy filed with  
3 the Clerk of the Arizona Supreme Court  
4 this 27<sup>th</sup> day of April 2023

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